Office-Supreme Court,
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SEP 24 1981
ALEXANDER L. STEVA
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No. 80-2155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRWIN A. SCHIFF,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Do the Supreme Court decisions in *Edgington v. United States* and *Michelson v. United States* require in a federal criminal trial an instruction that *character evidence when considered with all the other evidence in the case may alone raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

II. Is it error in a federal criminal trial for the District Court to fail to charge the jury as to the purpose, function and effect of character evidence upon the Government's burden of proof, specifically that *character evidence when considered with all the other evidence in the case may raise a reasonable doubt in the mind of the jury*, when such an instruction is requested by the defendant?

III. Is it error in a federal criminal trial and a Denial of Due Process under the Fifth Amendment for the District Court to instruct the jury that character evidence may not defeat a finding of guilt beyond a reasonable doubt, without also instructing that character evidence when considered with all the other evidence in the case may also raise a reasonable doubt, when such a balanced instruction is requested by the defendant?

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PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

Irwin A. Schiff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals For The Second Circuit entered in this case on January 28, 1981.

PETITIONER'S REPLY

THERE CURRENTLY EXISTS A CONFLICT BOTH AMONG AND WITHIN THE FEDERAL CIRCUITS AS TO WHETHER THE "ALONE" CHARGE IS REQUIRED AND THE CONFLICT IS BASED UPON DIVERGENT OPINIONS AMONG AND WITHIN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF TWO SUPREME COURT DECISIONS.

At the outset the Government misstates that the "sole contention here is that the District Court erred in refusing to instruct the jury that character evidence may by itself raise a reasonable doubt in the minds of the jury". (Brief for the U.S. in Opp., p. 4). The Government ignores the fact that the District Court failed to charge as to the purpose, function and effect of character evidence - specifically that character evidence when considered with all the other evidence may raise a reasonable doubt, which the Government recognizes in its own brief is the required charge in those Circuits and by those panels which do not accept the "alone" charge (Brief for the U.S. in Opp., p. 5).

In fact, the District Court's charge did quite the contrary. Rather than charging that character evidence when considered with all the other evidence may raise a reasonable doubt, the District Court charged that character evidence could not defeat a finding of guilt beyond a reasonable doubt reversing the context of the "reasonable doubt" reference.

The Government attempts to paint a picture that there is no conflict among and within the Circuits by arguing the merits of one side of the split, and by ignoring the District Court's failure to meet even this standard, specifically, that character evidence when considered with all the other evidence may raise a reasonable doubt. Yet, the Government recognizes that this Question Presented has been raised no less than five times before — first in 1957 and the last in 1970 (Brief of the U.S. in Opp., pp. 4-5, n.5.). By raising it again in our Petition, this makes four decades that the federal bar has attempted to remove the discrimination which varies from Circuit to Circuit and District to District in a charge that arises in most criminal trials. The circuits remain split as to whether the Supreme Court's decisions in *Edgington v. United States*, 164 U.S. 361, 17 S.Ct. 72, 41 L.Ed. 467 (1896) and *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 S.Ct. 168, 93 L.Ed. 168 (1948) entitle a federal criminal defendant to a jury charge that character evidence when considered with all the other evidence may "alone" raise a reasonable doubt, or whether the required charge is simply that character evidence when considered with all the other evidence may raise a reasonable doubt. Neither was charged in petitioner's case.

The Government states that *Edgington* and *Michelson* do not require the "alone" charge, or any other character evidence instruction. However, the Courts of Appeals do not agree, and it is the split in their judgment which the petitioner requests this Court to review. The Government's belief as to the meaning of *Edgington* and *Michelson* is not the issue — rather it is the Circuits

interpretation of them which is the center of the conflict that has resulted in the egregious discriminatory charges currently received by federal criminal defendants, an issue which is the basis of our Petition, yet a concern which the Government does not address. While the Government attempts to iron out the conflict and the reliance upon these Supreme Court decisions, an examination of the cases in question establishes that the wrinkle is in fact a tear.

Although the Government cited *Oertle v. United States,* 370 F.2d 719 (1966) (en banc), *cert. denied,* 387 U.S. 943, 87 S.Ct. 2075, 18 L.Ed 2d 1329 (1966), in arguing their position that there is no conflict, the case itself, contrary to six earlier decisions in that Circuit including the en banc decisions in *Petersen v. United States,* 268 F.2d 87 (10th Cir. 1967) (en banc), candidly noted:

> The Supreme Court in Edgington v. United States (citation omitted) laid down the rule of law on this point the Circuit Courts have since sought to follow. It is significant that the Circuits have not been consistent in the interpretation of Edgington, and the later case Michelson v. United States (citation omitted) (footnote citation to "compilation of cases in Petersen v. United States" which establish the split in the Circuits on the Question Presented in 1959 is omitted, *Petersen v. United States, supra,* at 89,n.3).

This 10th Circuit case, cited by the Government, states that *Edgington* and *Michelson* are the basis for the required instruction as to character evidence, contrary to the Government's position, that the various Circuits have split in their interpretation of these decisions, contrary to the Government's position, and that this "inconsistency" among the Circuits is "significant", contrary to the Government's position and claim that the conflict is "truly minor" (Brief of the U.S. in Opp., p.9). Again, it is the Circuits view which is of concern, not the Government's.

The Government tries to cloud the position of two Second Circuit decisions, both which unquestionably hold that the "alone" charge is required, conflicting with other panel decisions in the Circuit. In *United States v. Minieri,* 303 F.2d 550, 554; 555, (2d Cir. 1962), *cert. denied,* 371 U.S. 847, 83 S.Ct. 79, 9 L.Ed 2d 8 (1962), the Court could have hardly been clearer in its language or in the source of its reliance:

> Indeed the defense may introduce evidence of the defendant's good reputation to show that it is improbable that he committed the crime charged. Edgington v. United States (citations omitted). And under certain circumstances that testimony alone may raise a reasonable doubt as to the defendant's guilt, *and in the federal courts the defendant is entitled to such an instruction.* Michelson v. United States, (citation omitted): Edgington v. United States. (emphasis ours). *Id.*at 555.

The Court then held because the defendant did not object to the District Court's failure to charge the "alone" instruction, and because it was charged that character evidence "may render the task of the Government a heavier one to prove guilt beyond a reasonable doubt", the plain error doctrine would not apply. In petitioner's case there was an objection, and more importantly the District Court did not reference character evidence with reasonable doubt and did not give an analagous charge to the *Minieri* instruction that such evidence might make the Government's burden of reasonable doubt heavier, an intimation of the "alone" charge.

In *United States v. Cramer,* 447 F.2d 210, 219 (2d Cir. 1971), the Second Circuit, citing *Minieri, supra,* again upheld the "alone" charge, with *Edgington* and *Michelson* the authority, stating that the appellants "were entitled to such an instruction". *Cramer, surpra,* at 219. Again, the Court did not reverse because the charge, which clearly referenced character evidence to the Court's burden of reasonable doubt, was sufficiently explanatory. In petitioner's case, the only reference to reasonable doubt was that character evidence could not defeat a finding of guilt beyond a reasonable doubt. The very opposite of the purpose, function and effect of character evidence and the charge as required by *Edgington* and *Michelson.*

Further the Second Circuit's clear holding in *Minieri* and *Cramer* are in open conflict with the Second Circuit's decisions in *United States v. Fayette,* 388 F. 2d 728, 737 (2d Cir. 1968) and *United States v. Lowenthal,*224 F.2d 248, 249 (2d Cir. 1955). The fact that the Second Circuit is unwilling to resolve the conflict within its own Circuit, or to even author a panel decision attempting to harmonize the split, is not a writ of prohibition to the Supreme Court to end the discriminatory treatment that federal criminal defendants have now received upon this charge, where the value of the character evidence is more often

determined by the location of the courthouse, that the quality of the evidence. *Edgington* was decided in 1896, and *Michelson* in 1948. It cannot be said a fair opportunity has not been afforded the Circuits.

There are four other Circuits which have decisions adopting the "alone" charge, relying upon the *Edgington-Michelson* authority. The 7th Circuit has held in *United States v. Donnelly*, 179 F.2d 227, 233 (1950) and *United States v. Wicoff*, 187 F.2d 886, 890 (1951), that the "alone" or "itself" charge is required by the Supreme Court's decision in *Edgington*. In the 9th Circuit, the Court in *Weedin v. United States*, 380 F.2d 657, 660 (1967), was clear in its position that *Michelson* requires the "alone" charge:

> We agree with Weedin that evidence of good character may be sufficient alone to create a reasonable doubt of guilt (Michelson v. United States (citation omitted)..*Ibid.*

The 10th Circuit has twice in two conflicting en banc decisions recognized the split among the federal circuits on the Question Presented, and that it revolves upon the varying interpretations of *Edgington* and *Michelson*. *Petersen v. United States, supra,* at 89; *Oertle v. United States, supra,* at 726. In the District of Columbia Circuit, the Circuit has held that *Michelson* and *Edgington* require the "alone" charge:

> The principles governing the use of character evidence in criminal trials in this circuit have been delineated in the past and need only brief summarization here . . . Good-character evidence may of itself raise a reasonable doubt as to guilt, and the accused is entitled to have the jury so instructed. (footnote citations to both Edgington and Michelson omitted). *United States v. Lewis*, 157 U.S. App. D.C. 43, 482 F.2d 632, 637 (1973).

Accord: *United States v. Wooden*, 137 U.S. App. D.C. 1, 420 F.2d 251, 253 (1969); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261, 263 (1950); *United States v. Colbert*, 79 U.S. App. D.C. 261, 146 F. 2d 10,11 (1944).

The result is that five Circuits have decisions which interpret the *Edgington*

and *Michelson* cases as requiring the "alone" charge.

Even those Circuits which reject the "alone" instruction and follow the alternate charge that character evidence when considered with all the other evidence may raise a reasonable doubt, which was not given at petitioner's trial, base the requirement on either *Edgington* or *Michelson* or both.

3rd Circuit: *United States v. Klass*, 166 F.2d 373, 378-380; *United States v. Frischling*, 160 F.2d 370 (1947); *United States v. Quick*, 128 F.2d 832, 835-837 (1942).

4th Circuit: *Mannix v. United States*, 140 F.2d 250, 253-254 (1944).

6th Circuit: *Poliafico v. United States*, 237 F.2d 97, 114 (1956), *cert. denied*, 352 U.S. 1025, 77 S.Ct. 590, 1 L.Ed. 2d 597 (1957), *rehearing denied*, 353 U.S. 931, 77 S.Ct. 718 1 L.Ed. 2d 725 (1957).

8th Circuit: *Sunderland v. United States*, 19 F.2d 202, 215 (1927); *Black v. United States*, 309 F.2d 331, 343-344 (1962), *cert. denied*, 372 U.S. 934, 83 S.Ct. 880, 9 L.Ed. 2d 765 (1963).

In three of the Circuits where there are clearly conflicting decisions, the 2d, 9th, and 10th (Petition for Writ of Cert., pp. 7-11), the conflict in each is based upon the varying interpretations by the panels as to the requirements of *Edgington* and *Michelson*.

2d Circuit:

FOR: *United States v. Minieri, supra*, at 554-555; *United States v. Cramer, supra*, at 219.

AGAINST: *United States v. Lowenthal, supra*, at 249.

9th Circuit:

FOR: *Weedin v. United States, supra*, at 660.

AGAINST: *Smith v. United States*, 305 F.2d 197, 205-207 (1962), *cert. denied sub nom., Corey v. United States*, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed. 2d 124 (1962).

10th Circuit:

FOR: *Petersen v. United States, supra*, at 88-89.

AGAINST: *Oertle v. United States, supra, 726-727.*

There is not only a clear conflict among the federal Circuits, but within several of them, and the basis for the division is the interpretation each Circuit and panel give to the requirements of the Supreme Court's decisions in *Edgington* and *Michelson*. The Government's veiled implications to the contrary, are completely unfounded as the very cases clearly demonstrate.

There are few areas of the law where there exists more division and confusion, and on a recurring federal question which potentially can arise at every federal criminal trial. At present, there is a real and harmful discrimination which results not simply from Circuit to Circuit, but even District to District and Judge to Judge as to the character evidence instruction required. A comparison of the charge given in petitioner's case, with that given in two other Second Circuit cases, *United States v. Kabot*, 295 F.2d 848, 855, n.1 (2d Cir. 1961), *cert. denied*, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed. 2d 550 (1961); and *United States v. Crosby*, 294 F.2d 928, 947-948, *cert. denied sub nom, Mittleman v. United States*, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed. 2d 523 (1961) (See Petition for Writ of Cert., Appendix, pp. 45a-46a), establish the depth and degree of the discimination. The success or failure of a federal criminal defendant in the federal courts should not to any degree be determined by the venue and the varying law of the courthouse. This is the heart of our Petition, and the essential reason why Supreme Court review is imperative on what amounts to a major split among and within the Circuits on an exceptionally important federal question, the resolution of which revolves around two very old Supreme Court decisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents 1) a recurring federal question dealing with the administration of federal criminal justice upon which the federal Circuits are severely divided, the resolution of which turns upon the interpretation of two decisions of this Court and 2) which involves an important question of federal law that can only be settled by this Court.

The Petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of

Appeals for the Second Circuit and that the Court summarily reverse the judgment of the Court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Respectfully submitted,

Dated: September 18, 1981

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